No. (1)

Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

October Term, 1997

ANTHONY J. CRIPPEN,

Petitioner,

vs.

ROBERT KUHLMANN, as Warden of the Sullivan Correctional Facility,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What standards apply for the grant of a Certificate of Appealability under 28 U.S.C. §2253(b) and (c).

2. Did the Court below improperly deny a Certificate of Appealability given the serious questions raised by the habeas corpus petition in this case?

LIST OF PARTIES

The parties to this action are listed in the caption of the case. None of the parties has any subsidiary or parent companies.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Anthony J. Crippen prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Second Circuit dismissing his appeal from the denial of his habeas corpus petition.

OPINIONS BELOW

The Court of Appeals did not issue any opinion in this case, but only issued a short order dismissing the appeal. (Appendix, *infra*, 3a). The opinion of the District Court is unreported and is reproduced in Appendix D at 5a-14a.

STATEMENT OF JURISDICTION

The order of the Court of Appeals denying a Certificate of Probable Cause and dismissing the appeal from the denial of a habeas corpus petition was entered on December 30, 1997. A timely Motion for Rehearing was filed on January 12, 1998. The Motion for Rehearing was denied on February 10, 1998 (1a-2a). The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1). The jurisdiction of the district court over the underlying cause of action is conferred by 28 U.S.C. §2254.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The case was brought under 28 U.S.C. § 2254. Also involved is the due process clause of the Fourteenth Amendment to the Constitution of the United States and the Sixth Amendment right to effective assistance of counsel.

STATEMENT OF THE CASE

This case involves an important examination of the standards for the grant of a Certificate of Appealability under the Antiterrorism and Effective Death Penalty Act of April 22, 1996, codified at 28 U.S.C. §2253(b) and (c). Almost all of the lower federal courts have held that the substantive standards for the new Certificates are the same as the requirements for a Certificate of Probable Cause under the former version of 28 U.S.C. §2253. See e.g., *Cox v. Harris*, 133 F.3d 565, 569 n. 2 (8th Cir. 1997): "The AEDPA made no substantive changes in the standards by which applications for certificates of appealability are governed." See also *Nelson v. Walker*, 121 F.3d 828, 831-32 (2d Cir. 1997)(applying same standards). But see *Abrams v. Barnett*, 121 F.3d 1036, 1037-38 (7th Cir. 1997)(standards for permitting appeal may be more rigorous than pre-AEDPA standards).

In this case, the Second Circuit without discussion denied a motion for a certificate of probable cause/appealability. Since the questions raised by the habeas corpus petition are serious and debatable, the order refusing the certificate and dismissing the appeal is bewildering. It indicates that lower federal courts are not properly following the standards laid down by this Court in issuing such certificates. This Court should grant certiorari to give guidance to the lower federal courts to determine the standards for permitting appeal in habeas corpus cases.

Statement Of Facts

Petitioner is facing a life sentence in state court (he is not eligible for parole until he serves 50 years) based upon a conviction in which his counsel's efforts on his behalf fell far below the minimum required by the Constitution.

During the night of January 5, 1986, two young residents of Southampton, New York, Thomas Fehmel

and his fiancee, Winifred Alice Danz, were brutally killed in living quarters above "The Still," a bar near the Shinnecock Indian Reservation in Southampton, New York, where the Petitioner's family lived. (Trial Transcript "T" 1358-60; T 880-881).

The time of the deaths was placed at about 11:20 P.M. on January 5, 1986, according to the medical examiner called by the prosecution at trial (T 780, 797-798). The two victims, who were young and in good physical health, were killed by being stabbed at least 40-50 times with knives (T 799-813).

In addition, some cash from a wooden box contained in the apartment was stolen (T 498, 641, 683). Also taken was a television cable converter with an attending remote control unit (T 1032, 1033).

According to the trial testimony, Petitioner Crippen was observed *walking away* from the direction of The Still on the highway toward a store on the Shinnecock Reservation at about 6:45 P.M. on January 5, 1986 (T 572). There was no testimony or other evidence that he was seen carrying anything, such as the television cable converter and remote control unit allegedly stolen from the victims and thereafter recovered by the police. Nor was there any testimony that he was bloodied or that his clothes had any blood on them (T 568-573; 577-583).

Two witnesses, Launcelot Gumbs and his girl friend, Christy J. Hurley, testified that Petitioner Crippen came to Gumbs' house, about 6:30 P.M., on the evening of January 5, 1986 (T 1384-1385; 1468). All three persons (Crippen, Gumbs, Hurley) stayed in the house for about 90 minutes. Then at about 8-8:30 P.M. -- *three hours before the medical examiner testified the killings had occurred* -- the three friends drove to Astoria, Queens, about two hours from the scene of the crime (T 1384, 1468). There were no blood stains of any kind on his clothes during this entire period, according to both witnesses (T 1469, 1385-86). A witness who saw

Petitioner Crippen later that night in Astoria agreed that he had no blood stains on him or on his clothes (T 835-836).

Three other witnesses, not called at the trial, possessed certain information that would have shown it was impossible for petitioner to have committed the crime in the allotted time. Defense counsel was aware of these witnesses, their identities and stories, but they were never called to testify at the trial by Petitioner's trial counsel.

One witness, Curtis Terry, swore in an affidavit submitted later in state post-conviction proceedings under New York Civil Procedure Law, Section 440, (the "440 proceedings"), that Petitioner had spent the weekend during which the murders occurred at his home on the Shinnecock Indian Reservation in Southampton. He stated that on January 5, 1986, the day of the murders, the Petitioner left his home late in the afternoon for about 45 minutes after the conclusion of a football game they had been watching together on television (Affidavit of Curtis Terry, sworn to on February 28, 1992, submitted on CPL 440 motion, hereinafter "Terry Affidavit").

Terry described in his affidavit the clothes the Petitioner was wearing when he left. He stated that Petitioner was wearing the same clothes upon his return to Terry's home 45 minutes later (Id. at 2). This was close to the time the State contended the murders occurred. (The State speculated at the trial that the homicides occurred at around 7:15 or 7:30 P.M. on January 5, 1986, (T 1538), not around 11:20 P.M. which is the time the medical examiner placed the time of death (T 780, 797-798), when Petitioner was unquestionably already in Astoria.

Terry swore that he observed no bloodstains on the Petitioner when he returned to his house; that his demeanor was normal; and that he did not observe the

Petitioner carrying any gym or other bag upon his return (*Id.* at 2).

Such testimony would have tended to refute the State's argument, predicated solely on the Petitioner's written confession, as to what supposedly occurred at the murder site, and especially how the Petitioner "admitted" changing his clothes after the killing and what he wore thereafter.

Jonathan Smith also submitted an affidavit in support of the 440 motion. He described that in the early evening of January 5, 1986, he was driving his car in the vicinity of "The Still" accompanied by Michael Hunter and Andre Franklin when he came upon the Petitioner who was walking on the highway in a direction away from that site (Affidavit of Jonathan Smith, sworn to on February 9, 1992, at 1-2) [hereinafter "Smith Affidavit"].

Smith had a brief conversation with the Petitioner and described what the Petitioner was wearing, namely, the identical clothes described by Terry (*Id.* at Par. 2). Smith swore that he did not see any bloodstains on the Petitioner's clothes nor did he see him carrying a bag of any sort. The Petitioner's demeanor was normal (*Id.*).

Smith also stated that he had been interviewed by the police and thereafter by the prosecutor preliminary to testifying in the grand jury. He also swore that he had been pressured to testify falsely that when he observed the Petitioner on the road, he observed both bloodstains on his clothes and the Petitioner carrying a gym bag (*Id.*).

Smith refused to lie and apparently was not asked any questions about the Petitioner's appearance when he testified in the grand jury (*Id.*).

Terry, Smith, Hunter and Franklin were all interviewed by trial counsel at a joint meeting also attended by the Petitioner's father held many months prior to the

trial (Terry Aff. at 2-3; Smith Aff. at 3; T. Crippen Aff. at 5).

All of the foregoing individuals informed trial counsel of their observations made of the Petitioner on January 5, 1986, as well as other pertinent facts, and all expressed their willingness to testify on the Petitioner's behalf (Terry Affidavit at 3; Smith Affidavit at 3-4; Katz Affirmation at 3-4; T. Crippen Affidavit at 5-6).

None of these individuals were ever contacted or interviewed again by trial counsel, nor were they called as witnesses at trial, even though their testimony would have been critical.

Trial counsel also presented character witnesses who were cross-examined about prior crimes committed by Petitioner, including one at the same locale as the murders for which he was then being tried. He also failed to prepare witnesses for, and to present the correct legal theory at, a suppression hearing relating to petitioner's confession. Finally he failed to make a substantial Fourth Amendment suppression motion.

For any one of these reasons, trial counsel rendered ineffective assistance of counsel, thus violating the Sixth Amendment. At the least, it is "debatable among jurists of reason," whether trial counsel's efforts fell below the constitutional benchmark in any of the five areas noted above. Petitioner should have been given the opportunity to present full argument to the Court of Appeals on these issues.

1. The Lower Court decision

The district court denied the petition for habeas corpus without a hearing in an order dated February 20, 1997 (Appendix D, 5a-14a). The decision below did not discuss, let alone analyze, two of the main claims made by petitioner, one bearing directly on his claim of innocence. As noted above, Petitioner claimed that counsel was inadequate in failing to call three witnesses

who would have testified that it was impossible for him to have committed the two homicides since his observable movements placed him too far from the scene of the crime during the relevant time period. In addition, the lower court mentioned but did not discuss the breach of the attorney-client relationship, in which trial counsel disclosed an alleged confession made by his client.

The only issue which the lower court did briefly discuss was petitioner's claim that counsel was not effective in his conduct of the *Huntley* hearing, challenging a confession allegedly made by Crippen. (11a-12a). The court noted that there were valid reasons for not calling other witnesses at the suppression hearing, since the other potential witnesses were interested parties who could have been cross-examined. In addition, if petitioner or other witnesses were called, allegedly other incriminating evidence could have been submitted to impeach them.

Rather than discuss the other instances of ineffectiveness, the Court simply noted that the State's case against petition was "devastating." (13a), specifically noting his confessions, his possession of a converter box stolen from the bar where the crimes occurred and his alleged "placement on the scene." What the court did not note was the fact that there was no physical evidence found on the crime scene which was traceable to Petitioner Crippen: there was no blood or hair samples, no fingerprints, no blood on any of his clothes. (Trial Transcript "T" 599-670; 698-700). None of the witnesses saw evidence of blood stains on defendant's body or clothes at any time before that. (T 1389; 1468; 1469; 1483). It is clear that without the tainted confession, there was no way that a jury could have convicted petitioner.

2. The Second Circuit's Refusal to Issue A Certificate of Probable Cause

Petitioner filed a timely Notice of Appeal and filed a Motion for the Issuance of a Certificate of Probable Cause/Appealability before the Second Circuit. Without comment of any kind, the Court of Appeals denied the motion by order dated December 30, 1997 (3a). A timely motion for rehearing was filed, but was denied on February 10, 1998(1a).

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD DECIDE THE STANDARDS FOR PERMITTING APPEALS IN HABEAS CORPUS CASES AND SHOULD CORRECT THE LOWER COURT'S ERROR IN NOT PERMITTING SUCH AN APPEAL IN THIS CASE.

This Court had previously established the standards for permitting appeals in habeas corpus cases. Under applicable law, an applicant for a certificate of probable cause (and hence for the new certificates of appealability) must make a "substantial showing of a denial of a constitutional right." He or she meets this if he or she demonstrates that "the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner than the court below]; or that the questions are 'adequate to deserve encouragement to proceed further,'" *Barefoot v. Estelle*, 463 U.S. 880, 893, n4. (1983)(emphasis in original)(citations omitted). See also *Reyes v. Keane*, 90 F.3d 676, 680 (2d Cir. 1996): "The new requirement of a certificate of appealability ("COA") appears to make no significant change in the standard applicable to the former requirement of a certificate of probable cause ("CPC")." Pursuant to that standard, an applicant for habeas corpus must make "a substantial showing of a denial of a constitutional right," *Reyes, supra*, 90 F.3d at 680.

That standard was clearly met in this case. There were at least five instances of constitutional inadequacy in this case. The Court of Appeals refusal to grant the appeal certificate shows it did not understand the applicable standard. This Court should grant the writ in order to lay out the proper standards for permitting appeals in all habeas corpus cases.

The confusion as to the proper standards is shown by the facts in this case. There is no doubt that Petitioner made a substantial showing that his trial counsel was constitutionally ineffective. Yet the Court of Appeals refused to allow him to present his arguments at the appeal level.

Under the test for determining ineffectiveness of counsel laid out by this Court in *Strickland v. Washington*, 466 U.S. 668 (1985), a petitioner must show both incompetence of counsel and prejudice as a result of such incompetence. Both inadequacy and prejudice are alleged, and Petitioner has made a substantial showing that they were present in this case.

a. *Violation of the Attorney-client privilege*

State trial counsel presented a totally inadequate defense in this case. In a completely unprecedented action and contrary to every ethical rule and legal requirement that an attorney protect the confidentiality of his client's communications, trial counsel submitted an affirmation as part of the State's opposition to the CPL 440 post-conviction motion in the County Court, asserting the Petitioner had purportedly confessed to him that he had committed the crimes for which he was charged and convicted:

> *During the initial stages of my representation of the defendant*, and in the presence of his father, ANTHONY J. CRIPPEN admitted to me that he had, in fact, murdered THOMAS FEHMEL and WINIFRED DANZ.

(Booth Affirmation, undated, part of Exhibit E to Notice of Motion for Leave to Appeal to the Appellate Division, Second Department, dated August 31, 1992 at par. 7.)

This unprecedented submission of an incriminating affidavit against his own client was justified by the state on the ground that certain ethical constraints were imposed on counsel, justifying his abysmal performance.

Such a claim cannot be accepted. If counsel had any ethical qualms about continuing to represent the Petitioner in a vigorous fashion, as he now suggests he had, he had a duty to withdraw from the case. This is especially so since the supposed confession was made to him at the "initial stages" of his representation -- anywhere from about seven to ten months prior to trial (Booth Affirmation at Par. 7).

Surely it is "debatable" whether counsel was justified in making the disclosure and in restricting the defenses that he raised. A certificate of probable cause/appealability should have been issued to examine the issue.

b. *The Failure to Present Exonerating Witnesses*: Petitioner submitted affidavit testimony from three witnesses who were never called at trial to show that he could not have had time to commit the crimes in question. Those affidavits must be accepted as true for the purposes of determining whether a hearing should be held. See *Moreno-Ortiz v. United States*, 983 F.2d 15, 17 (2d Cir. 1993).

At the trial, four witnesses testified concerning Petitioner's movements during the day of the crime, January 5, 1986. Based on that testimony, Petitioner was observed (1) at the house of a friend, Launcelot Gumbs, up to 3:00 P.M.; (2) walking on the highway after 6:00 P.M. moving away from the bar where the crimes

occurred, The Still, but without any testimony about whether he was carrying anything or what he looked like; (3) coming back to the Gumbs house about 6:30 P.M. and then staying there until after 8:15 P.M. when Petitioner left to go to Astoria. Based upon this scenario, the State argued that there was enough time for Petitioner to commit the crimes at the Still.

But this possibility could have been totally demolished by the testimony of three individuals who were known to trial counsel but never called as witnesses. Crucial in this regard was the testimony of Curtis Terry, which did not overlap, and was not cumulative to, the testimony of any other witness. Terry stated under oath that Petitioner was with him "virtually the entire day" of January 5, 1986, and was with him after 3:00 P.M. (Terry Affidavit, p. 1). Terry further swore that Petitioner left his home late in the afternoon *for about 45 minutes* after the conclusion of a football game they had been watching together on television (*id.* at 1-2). Terry stated that Petitioner was wearing the same clothes upon his return to his home 45 minutes later. Terry did not observe any bloodstains on the Petitioner nor did he see him carrying any gym or other bag when he returned. After the Petitioner's return, Terry observed him walk to Gumbs' house just a few yards away, again without any bag (*Id.*). This was consistent with the testimony of Gumbs and his girl friend that Petitioner came to their house after 6:00 P.M.

Thus Terry could have destroyed the State's theory that Petitioner had the opportunity to leave Terry's house late in the afternoon (which was only a few yards from the Gumbs house), walk to the Still (almost a mile away), then walk back to get a screwdriver, then return to the Still to burglarize the bar and kill the occupants and then return to Terry's house, all in 45 minutes.

It must be noted that if the testimony of these witnesses is accepted, it would totally undermine the

validity of the confession, which is practically the entire basis of the State's case. If there was no time or opportunity for Petitioner to have committed the crime, then his confession must be involuntary, as he has claimed.

The district court's only comment with respect to the testimony of Terry, Hunter and Smith is that "much of the proposed testimony conflicts directly, in both time and place, with testimony given by petitioner's 'friends' at trial." (14a). With all due respect, the above description shows that the new witnesses would have filled the gaps left by the testimony of those who were called. In any event, the testimony of Terry was so helpful in narrowing the time interval in which petitioner could have committed the crime that it is impossible to discern any legitimate reason for not placing him on the stand. Certainly the issue requires a hearing at which all the facts could be examined. At the least "jurists of reason" could debate about the need for a hearing.

Based upon this showing, a certificate of probable cause/appealability should have issued with respect to the ineffectiveness claim relating to the failure to present the three exonerating witnesses described above.

c. The Inappropriateness of Calling Character Witnesses.

It is fundamental that a defense counsel should not be the instrument of incriminating evidence being presented against his client. See e.g. *Henry v. Scully*, 78 F.3d 51 (2d Cir. 1996)(counsel was constitutionally ineffective in failing to object to the improper admission of a codefendant's confession which implicated his client). In this case, state trial counsel called a series of character witnesses who presented minimal helpful evidence in petitioner's favor on their direct testimony. On cross, they predictably presented devastating evidence that helped to incriminate petitioner.

The calling of these witnesses allowed the State to cross-examine them with respect to extremely prejudicial evidence which could never have been otherwise admitted unless Petitioner himself testified, namely that Petitioner had committed a series of burglaries and other crimes, at least one when armed with a knife, including crimes at the very place where the murders in question occurred.

Each of four character witnesses presented by the defense were questioned on cross-examination whether they had heard a report that on September 4, 1981, the Petitioner, who was armed with a knife approached a young college student at the railroad station in Southampton, put a knife to his head, told the victim that he would stab him if money was not forthcoming, forced the victim to strip, robbed him and then fled (T 1322-3). *No objection of any kind was made to this question.*

It is obvious that Petitioner's trial counsel was neither aware of the law (regarding the proper scope of cross-examination of character witnesses) nor the facts (regarding what offenses his client ever committed, was arrested for, or charged with, and what the character witnesses knew or had heard about such acts). He obviously did not interview, much less prepare those witnesses for their testimony. He thus allowed highly prejudicial testimony about his client to be presented to the jury, which would otherwise not have been admitted -- including the devastating fact that he was once arrested for a burglary of The Still, the very scene of the felony-murders with which he was then being tried.

In this case, there were no eyewitnesses to the crime, and there were other witnesses who placed Petitioner far from the crime scene within the period of the commission of the homicides. The chief evidence against him was his confession, which Petitioner claims was involuntary and which, as noted below, should have been suppressed on Fourth and Fifth Amendment grounds. Without the jury's knowledge of Petitioner's

former burglaries which placed him at the scene of the crime during a previous criminal episode, there is certainly a strong probability that the "outcome of the trial would likely have been different." [1]

The district court's only comment with respect to the character witness issue was that Petitioners counsel was "an attorney with thirty years of trial experience at the time of trial, is a former New York City Criminal court judge." (14a). With all due respect, the issue is not frivolous and is one that "jurists of reason" might debate. Thus a certificate of probable cause/appealability should have issued with respect to that issue.

d. The Failure to Conduct a Proper Involuntariness Hearing:

Petitioner's counsel made a motion to suppress his confession on the ground of involuntariness pursuant to *People v. Huntley*, 15 N.Y.2d 72 (1965).

The hearing record demonstrates that, although he had more than ample time to do so (three weeks), trial counsel had never bothered to interview the one witness whom he proposed to call, Charles Berring, until literally just a "moment or two" before calling him to the stand (H 169). He then interviewed him in order to "see if I am going to call him." (H 171). Berring was then called as a witness. He testified that he walked by a police interrogation room in Yaphank on the evening of January 13, 1986 on his way to the men's room when he saw Petitioner in a room with 16-20 officers. One

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1 The fact that his girl friend was in possession of a cable converter box which matched the number of the box stolen from the victim's apartment is hardly overwhelming evidence of petitioner's guilt. Petitioner may have obtained the box innocently from a third party or it could have been taken at a time other than when the murders occurred. Other exonerating possibilities also exist.

detective had his hands "raised up in his face." (H 181). The detective was "shouting" at him. (*id.*) But he saw no force actually being applied to Mr. Crippen. (H 240).

It should have been readily apparent to any competent lawyer that it was ludicrous to urge a finding of involuntariness based solely upon such testimony. Yet that is precisely what defense counsel did.

The failure to call Cynthia Bellommee, Petitioner's girl-friend at the time, as a witness at the involuntariness hearing was particularly egregious. Ms. Bellommee later testified *for the prosecution* at the trial that when she and Michael Gilmore visited the Petitioner in jail on January 14, 1986, just hours after he had "confessed," the Petitioner told them that he had been beaten and drugged (T 1225-1227). He looked "like a zombie," (T 1202). "He was looking like all up in the sky" (T 1202-1203). Crippen told her that the police "gave me something." (T 1224, 1225-1226). But she was never called at the suppression hearing to testify when such evidence would have been relevant.

There was one other witness who should have been called but was not: the Petitioner. It should be self-evident that defense counsel's decision not to have the Petitioner testify at the involuntariness hearing was a disastrous one. He could also have testified on the pressure placed upon him to confess. It simply cannot be said that such decision had any rational or discernible tactical basis.

e. The Failure to Make a Fourth Amendment Suppression Motion:

In addition to his utter ineffectiveness in presenting that Fifth Amendment coerced confession claim, trial counsel failed to even perceive, much less raise, a viable claim under the Fourth Amendment that the Petitioner's confession and admissions should be suppressed because they were the fruit of an illegal arrest.

Trial counsel never sought a hearing pursuant to *Dunaway v. New York*, 442 U.S. 200 (1979). He never honed in on the issue of lack of probable cause during his cross-examination of the arresting officer; and did not call the Petitioner or other potential witnesses to testify concerning his illegal arrest, precisely because he did not perceive the existence of a Fourth Amendment issue. See *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986)(failure to file timely suppression motion based upon ignorance of facts or law shows counsel's ineffectiveness). See also *DeLuca v. Lord*, 77 F.3d 578 (2d Cir. 1996)(abandonment of consideration of viable defense constitutes ineffectiveness).

There is a strong probability that the result would have been different if a meaningful *Dunaway* argument had been presented at a suppression hearing.

CONCLUSION

This Court should grant the writ to decide what are the proper standards for issuing appeal certificates and whether the Court of Appeals was correct in refusing to grant such a certificate in this case.

Dated: May 11, 1998

Respectfully submitted,

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APPENDIX A

ORDER DENYING MOTION FOR REHEARING FILED FEBRUARY 10, 1998

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Docket No. 97-2179

ANTHONY J. CRIPPEN

Plaintiff-Appellant

v.

ROBERT KUHLMANN as Warden
of Sullivan Correctional Facility

Defendant-Appellant

GEORGE LANGE III
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the tenth day of February one thousand nine hundred and eight,

Present:

Hon. Amalya L. Kearse,
Hon. Joseph M. McLaughlin,
Hon. Dennis Jacobs,

CIRCUIT JUDGES,

A petition for rehearing having been filed herein by appellant pro se Anthony J. Crippen,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Dated: February 10, 1998

GEORGE LANGE III, Clerk

Beth J. Meador
Administrative Attorney

APPENDIX B

ORDER DENYING MOTION FOR CERTIFICATE OF PROBABLE CAUSE FILED DECEMBER 30, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 97-2179

CRIPPEN

v.

KUHLMANN

Appellant Anthony J. Crippen having filed a motion for a certificate of Probable Cause,

Upon consideration thereof, it is

ORDERED that the motion is denied and the appeal is dismissed.

FOR THE COURT
George Lange III,
By: /s/ Arthur M. Heller
ARTHUR M. HELLER
Administrative Attorney

Dated: December 30, 1997

APPENDIX C

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS FILED FEBRUARY 25, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

94-CV-3636 (TCP)

ANTHONY J. CRIPPEN,
Petitioner,

-against-

ROBERT KUHLMANN, Warden,
Respondent.

A memorandum and order of the the Hon. Thomas C. Platt, United States District Court having been filed on February 20, 1997 denying ANTHONY J. CRIPPEN'S petition for a writ of habeas corpus pursuant to 28 U.S.C. 2254, IT IS

ORDERED AND ADJUDGED that the Petitioner ANTHONY J. CRIPPEN take nothing of the respondent ROBERT KUHLMANN, Warden of Sullivan Correctional Facility; and that the petition for a write of habeas corpus is hereby dismissed.

Dated: Uniondale, New York
February 25, 1997

ROBERT C. HEINEMANN
Clerk of the Court

by/s Joseph Di Talia
JOSEPH DI TALIA
Deputy Clerk in Charge

APPENDIX D

MEMORANDUM AND ORDER DENYING WRIT OF HABEAS CORPUS FILED FEBRUARY 20, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

94-CV-3636 (TCP)

ANTHONY J. CRIPPEN,
Petitioner

-against-

ROBERT KUHLMANN, Warden,
Respondent.

PLATT, Judge.

Petitioner moves pursuant to 28 U.S.C. §2254 for issuance of a writ of habeas corpus on the ground that he was denied his Sixth Amendment right to effective assistance of counsel. Petitioner maintains that a number of instances of ineffectiveness prejudiced the outcome of his trial. For the reasons stated herein, petitioner's motion is DENIED in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

On 17 January 1986 petitioner was indicted in Suffolk County on two counts of second degree murder pursuant to Section 125.25(1) of the New York Penal Law ("NYPL") (intentional murder), two counts of second degree murder pursuant to NYPL Section

125.25(3) (felony murder), and two counts of first degree burglary pursuant to NYPL Section 140.30(2) (causing physical injury to a person not a participant). The indictment charged petitioner with the murders of Winifred Danz and Thomas Fehmel, who were found stabbed and bludgeoned to death in the bathtub at Mr. Fehmel's apartment on 5 January 1986. The Court notes at the outset that both the night's receipts from the adjacent tavern -- owned by Fehmel's mother -- and a cable converter box and television remote control were established to be missing from that apartment.

Petitioner became a suspect after police investigators established that he was seen walking near the Fehmel apartment on the same date and at approximately the same time the crime occurred. Detectives picked petitioner up for questioning approximately one week after the murders. Roughly six hours later, petitioner confessed to burglarizing the apartment and repeatedly stabbing and bludgeoning both Ms. Danz and Mr. Fehmel.

The trial court conducted a pre-trial hearing to determine the admissibility of petitioner's confession. At that hearing, Detective William Donahue testified that he confronted petitioner in Astoria, Queens, on 13 January 1986. Detective Donahue testified that petitioner first denied that he was Anthony Crippen, then admitted both that fact and the fact that he had burglarized the Fehmel apartment. Detective Donahue thereafter read petitioner his Miranda rights, which he waived before stating that he would talk about the burglary. Detectives then brought petitioner to the station, where he allegedly agreed to talk to Detective Anthony Palumbo alone in the men's room after expressing concern that the room they were in was bugged. Once there, petitioner confessed to the burglary and both murders. He repeated that confession to detective Donahue, and later signed a detailed statement written out by Donahue. Petitioner repeated his confession to two other officers as he was being transported to his arraignment the next day.

Petitioner's counsel called only one witness at the pre-trial hearing, Charles Berring, who he allegedly did not interview prior to the hearing. Berring testified that he walked by a police interrogation room on the night petitioner confessed and saw petitioner with sixteen to twenty officers, one with his hands "raised in his face." (Hr'g Tr. at 181.) He saw no force being applied to petitioner. Counsel did not call petitioner or his girlfriend to testify, the latter of whom testified for the prosecution at trial that petitioner looked like a zombie the day after his arrest and told her he had been beaten and drugged by his interrogators. (Trial Tr. at 1202.)

At the conclusion of the pre-trail hearing, the trial court held that petitioner's confession was obtained properly and would be admissible at trial.

On 29 October 1986, after a trial in Suffolk County Court, a jury convicted petitioner of the charged murders. The jury concluded that petitioner killed Ms. Danz and Mr. Fehmel after they walked in on him while he was burglarizing their apartment. On 11 December 1986 the court sentenced petitioner to two consecutive sentences of twenty-five years to life imprisonment.

In addition to the confession evidence recited above, the jury heard, inter alia, the following testimony: Andre Franklin, a friend of petitioner, testified that he saw petitioner walking on the highway in the area of the Fehmel apartment at 6:45 P.M. on the evening of the murders; Thomas Burke, another friend, testified that petitioner came to his house in Astoria at 11:00 P.M. the same night; Cynthia Bellommee, petitioner's girlfriend, testified that she saw petitioner the next day, that he had a cable converter box with him, and that he gave it to her; Eugene McReady, another detective, testified that he retrieved from Bellommee's apartment a cable converter box the serial number of which matched the number of the box stolen from the Fehmel apartment; Launcelot Gumbs and Christy Hurley, friends of petitioner, testified that petitioner came to their house

about 6:30 P.M. the evening of the murders and stayed with them until they all left for Astoria between 8:00 and 8:30 P.M. The jury also heard from four witnesses called to testify to petitioner's reputation for peacefulness. On cross examination of those witnesses, the prosecution was able to introduce information concerning numerous prior burglaries petitioner allegedly committed, including one at the Fehmel apartment.

In two separate actions, petitioner both appealed his conviction and moved to vacate pursuant to New York Criminal Procedure Law Section 440.10. Petitioner premised both actions on claims of ineffective assistance of counsel. The trial court denied petitioner's motion to vacate on 4 August 1992. Petitioner appealed that denial to the Appellate Division, which consolidated that appeal with the direct appeal.

By opinion dated 9 August 1993, the Appellate Division affirmed both the judgment of conviction and the denial of petitioner's motion to vacate. The Court found that petitioner received meaningful representation through competent trial counsel. Leave to appeal was denied.

Petitioner grounds the instant ineffective assistance claims on numerous instances of alleged misconduct by counsel before and during trial.

Petitioner first alleges that his counsel's presentation of character witnesses, which allowed cross examination concerning petitioner's prior bad acts, was improper. Petitioner asserts that his counsel seemed unaware that character witnesses may be cross-examined concerning a defendant's prior bad, immoral, or criminal acts, regardless of whether the defendant was charged or convicted of such acts. Petitioner asserts counsel also was unaware that such cross-examination must be confined solely to the trait attributed to the defendant by the character witness on direct examination. Also, petitioner alleges that counsel failed to request that the State establish a good faith

basis for raising prior acts, despite having been informed of the State's intention to question the character witnesses regarding seventy-two crimes petitioner allegedly committed.

Second, petitioner alleges that counsel failed to request and obtain an alibi charge. Petitioner argues that failure constitutes ineffectiveness because counsel both introduced evidence and argued to the jury that petitioner was not and could not have been present at the Fehmel apartment when the murders occurred.

Third, petitioner argues that counsel was ineffective in his conduct related to the pre-trial suppression hearing. Petitioner argues that counsel's actions were inadequate in three respects: (1) though counsel obtained a three week adjournment in order to call Mr. Berring, he conferred with Mr. Berring only once, moments before putting him on the stand; (2) counsel failed to call Cynthia Bellommee, petitioner's ex-girlfriend, and Michael Gilmore, petitioner's friend, who could have testified that petitioner appeared drugged only hours after giving his confession, and failed to call petitioner, who could have testified to the pressure placed upon him to confess; and (3) counsel should have made a motion to suppress petitioner's confessions pursuant to Dunaway v. New York on the ground that they were the fruit of an illegal arrest.

Fourth, petitioner alleges that counsel failed to call certain key witnesses at trial who could have cast doubts upon the prosecution's theory of how and when the murders occurred and undermined the believability of petitioner's confession. Petitioner asserts that counsel should have called the following witnesses: Curtis Terry, who could have testified that petitioner spent virtually the entire day in question with him and his girlfriend and that, though petitioner left Terry's home for approximately forty five minutes, he appeared calm and was wearing the same clothes upon his return; Jonathan Smith, who was allegedly driving on the Montauk Highway, could have testified that he saw petitioner

walking on that highway at approximately the same time the State contended the murders occurred; and Michael Hunter, a passenger in Mr. Smith's car, could have corroborated Smith's testimony. Petitioner contends these witnesses could have shown that he did not have time to leave Terry's home, go to the apartment, commit the murders, hide the items taken from the apartment, change his clothes, and return to Terry's home.

Fifth, petitioner contends that counsel failed to abide by the attorney-client privilege. In an affirmation submitted in opposition to petitioner's allegation of ineffectiveness, counsel stated that petitioner confessed to him that he committed the murders.

DISCUSSION

To present a valid ineffective assistance claim petitioner must show both that his counsel's performance "fell below an objective standard of reasonableness," Strickland v. Washington, 466 U.S. 668, 688 (1984), and that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. The Supreme Court in Strickland directed that courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," as "[t]here are countless ways to provide effective assistance in any given case." Id., at 689. Petitioner's burden is thus "highly demanding," Kimmelman v. Morrison, 477 U.S. 365, 382 (1986); he must rebut the strong presumption of competence "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman, 477 U.S. at 365. "Only those habeas petitioners who can prove under Strickland that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ . . .," Kimmelman, 477 U.S. at 382.

purpose of the inquiry "is not to grade counsel's performance," Id., at 697, but to evaluate whether, "absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695. Thus, a reviewing court need not pass on the deficiency of counsel's performance "before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Id. at 697. The prejudice determination properly may begin "with an examination of the strength of the prosecutor's case." United States v. Aulet, 618 F.2d 182, 188 (2d Cir. 1980). Even professionally unreasonable errors by counsel do not warrant setting aside a criminal conviction if those errors had no effect on the judgment. Strickland, 466 U.S. at 691.

Courts have enumerated a number of more specific points to be considered in passing upon an ineffective assistance claim, which may or may not be dispositive depending upon the facts of a given case. Because counsel are not required to make suppression motions in every case, failure to do so does not justify overturning a conviction absent "a clear showing of inadequacy." Aulet, 618 F.2d at 187-88. Failure to make a Dunaway motion is not error unless petitioner can establish the motion's likelihood of success; even then any error may be harmless in light of the other evidence. Solomon v. Comm'r of Correctional Servs., 786 F. Supp. 218, 227 (E.D.N.Y. 1992). Failure to call alibi witnesses and request an alibi charge may not be prejudicial. Matos v. Miles, 737 F. Supp. 220, 223 (S.D.N.Y. 1990). Finally, it may be reasonable to attack Government witnesses through cross examination rather than calling defense witnesses exposed to cross examination. Leaks v. United States, 841 F. Supp. 536, 545 (S.D.N.Y. 1994).

Rather than beginning with the strength of the State's case against the instant petitioner, the Court will first evaluate counsel's alleged inadequacies with regard to suppression of petitioner's confessions. Before approaching him, the police determined that petitioner was walking on a highway near the Fehmel apartment on the date and around the time the murders occurred.

One week after the murders, Detective Donahue approached petitioner in Queens and asked him if he was Anthony Crippen. Petitioner was not under arrest at that point. Petitioner first denied that he was Crippen, then not only admitted that fact but admitted that he had burglarized the Fehmel apartment on the night in question. Detective Donahue then read petitioner his Miranda rights, which he waived before stating that he would talk about the burglary. There is simply no basis on these facts to support a motion to suppress petitioner's confessions as the fruit of an illegal arrest pursuant to Dunaway v. New York; petitioner's argument that counsel's performance was constitutionally deficient for failure to do so is without merit.

Petitioner next contends that counsel was ineffective in that he failed to call additional witnesses and adequately prepare for the suppression hearing. The Court first notes that counsel sought and obtained a three week adjournment of the hearing in order to procure Mr. Berring. The entirety of Berring's testimony concerned the fact that he had been in the station house, had walked by the room where petitioner was being questioned, and had seen petitioner with sixteen to twenty officers, one of whom had his hands raised in petitioner's face. He saw no force being applied to petitioner. Berring's testimony was not complex; even if counsel did not speak with Berring until minutes before he took the stand, the Court does not find that fact particularly noteworthy.

Counsel's decision not to call petitioner's girlfriend Bellommee or friend Gilmore likewise does not necessarily reflect an absence of preparation or sound strategy. Both were interested parties, and both would have been exposed to cross examination by the State. Furthermore, Bellommee testified at trial that, on the day after the murders, petitioner gave her a cable converter box that proved to be the one stolen from the Fehmel apartment. Though not directly relevant to the legality of his confessions, the box ties petitioner to the

burglary that formed the basis for the detectives' right to arrest him and continue to question him subsequent to waiver of his Miranda rights. Counsel may have been rightly eager to keep that testimony from the judge, who was charged with considering whether petitioner's statements -- from the time of his arrest forward -- were obtained legally. The Court may not rule as a matter of law that failure to risk a vigorous cross examination and the likelihood of adverse testimony constitute Ineffective assistance.

Further support for the foregoing can be found in the fact that the "payoff" for taking such risks was testimony that petitioner "appeared drugged" and claimed to have been beaten the day after confessing to the murders--despite a complete lack of supporting physical evidence. Furthermore, petitioner's counsel effectively cross-examined the State's witnesses at the pre-trial hearing, raised evidentiary objections, obtained Rosario-Conzolazio material, and offered appropriate oral argument.

Turning to "an examination of the strength of the prosecutor's case," Aulet, 618 F.2d at 188, petitioner could not have been prejudiced even had all of counsel's remaining alleged errors been both actual error and unreasonable. The State's case against petitioner -- his placement at the scene, the confessions, the stolen cable converter box recovered from Bellommee's apartment, and other circumstantial evidence -- was devastating. Given the strength of the State's case, there is no basis for setting aside the jury's judgement that petitioner was guilty of the crimes charged. Counsel's unreasonable errors -- if any -- could have had no effect on that judgment. See Strickland, 466 U.S. at 691.

Some brief final observations may minimize needless reconsideration of petitioner's remaining assertions. One of petitioner's principal contentions is that his counsel was unaware that character witnesses may be cross-examined concerning a defendant's prior bad, immoral, or criminal acts. The Court simply notes

that petitioner's counsel, an attorney with thirty years of trial experience at the time of trial, is a former New York City Criminal Court Judge. As to petitioner's contentions regarding exculpatory testimony from additional witnesses, the Court notes that much of the proposed testimony conflicts directly, in both time and place, with testimony actually given by petitioner's "friends" at trial. These contentions -- which could not be dispositive in any case in light of the foregoing discussion -- do not assist petitioner's ineffective assistance argument.

CONCLUSION

Based upon all of the foregoing, petitioner's petition for a writ of habeas corpus must be, and the same hereby is, DENIED. SO ORDERED

/s/Thomas Platt, U.S.D.J.

Dated: Uniondale, New York
20 February 1997

Supreme Court, U.S.
FILED
JUN 23 1998
CLERK

No. 97-1824

In The

Supreme Court of the United States

October Term, 1997

ANTHONY J. CRIPPEN,

Petitioner,

vs.

ROBERT KUHLMANN, as Warden of the Sullivan Correctional Facility,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In this case the United States Court of Appeals for the Second Circuit denied Crippen's application for a certificate of probable cause. Should this Court decide the standard for a certificate of appealability when that device was not utilized in this case?

2. Every court which has reviewed Crippen's claim of ineffective assistance of counsel has held that it is meritless. Every court which has reviewed this claim has applied the facts to the correct legal standard. Should this Court engage in a factual review in order to essentially grant Crippen a certificate of probable cause?

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STATEMENT OF THE CASE

In this case the Court of Appeals for the Second Circuit denied Crippen's application for a certificate of probable cause. The Circuit Court utilized the certificate of probable cause rather than a certificate of appealability because Crippen had filed his petition for a writ of habeas corpus before the effective date of the Antiterrorism and Effective Death Penalty Act. There is no question in this case about the appropriate standard of review for a certificate of appealability. Furthermore, there is no necessity for further review in this case because the legal principle involved — effective assistance of counsel — is neither obscure nor complex and the lower courts correctly applied the law to the facts of the case.

A. Statement of Facts

On January 5, 1986 Winifred Danz and Thomas Fehmel were murdered in Mr. Fehmel's apartment in Southampton, New York. Ms. Danz and Mr. Fehmel had gone to New York City that day to purchase their wedding rings (T.499-500). While they were gone Mr. Fehmel's mother went to the apartment for various reasons and left at about 6:30 P.M. (T.512-14). Mr. Fehmel's brother checked the apartment at 7:40 to 7:45 p.m. that same night and saw the victim's car was parked nearby and that the lights were on in the apartment (T.520-21). When the bodies of Mr. Fehmel and Ms. Danz were discovered, they were completed dressed and were still wearing their winter coats. Their take-out Chinese dinner was unopened on the table.

The police investigation established that Crippen was in the area of the apartment at the time that the couple was killed (T.561-66). Later that same evening, Crippen, who was visiting his cousin, left Southampton and returned to New York City; this was confirmed by Crippen's cousin who testified on

Crippen's behalf (T.562-63, 824-25, 1382-84, 1482-83). Crippen went to a housing development in Long Island City, Queens County. There, he told a friend that his cousin had done something out "on the Island" and he did not want to be blamed for it (T.824-25, 833-34, 842). Crippen remained at the Long Island City apartment from late on January 5th until the evening of January 6th when his girlfriend picked him up and brought him to her house (T.836-38, 856, 1186-87). At her house Crippen gave his girlfriend a cable television converter box (T.1092, 1188-97). The converter box, which was identified through a unique serial number, had been installed in the victim's apartment a few weeks before the murder (T.1035-36, 1134-38, 1142-43). Blood found on the converter box was consistent with Mr. Fehmel's blood (T.710-11). Crippen, therefore, was at the scene of the crime at the appropriate time, left the area soon afterwards, made veiled references about the crime to a friend later that same night, and soon after the crime gave proceeds from the crime to his girlfriend.

Additionally, Crippen confessed to the murders both orally and in writing (T.982-84, 1069-79). These detailed confessions explained how Crippen was interrupted during a burglary, how he stabbed his victims, cut the woman's throat, went to get more knives from the kitchen and continued to stab the victims, and then beat them with a pipe. Crippen also admitted his guilt to the police officers who transported him to jail and to court. Thus, when Crippen was brought from Police Headquarters in Yaphank to the Southampton Town Jail in Hampton Bays he said that he had really fouled up and committed a double homicide (T.1167-68). The next day when Crippen was brought to court he said that he was facing 50 years in jail and that the police should do him a favor and shoot him (T.1169-70, 1278-80).

Autopsies were performed on both victims. Thomas Fehmel died of multiple stab wounds, which cut the coratid artery,

jugular vein, and esophagus. There were also major blunt force injuries to the head and neck which were consistent with having been inflicted with a metal pipe (T.799-815). Similarly, Winifred Danz had multiple wounds which caused aspiration of blood. Her coratid artery and jugular vein were severed, as were her windpipe (trachea) and esophagus (T.787-89, 790-96).

B. Post-Conviction Procedural History

After his judgment of conviction was entered Crippen appealed. In the direct appeal he questioned the propriety of the cross-examination of his character witnesses and the trial court's jury charge. He also claimed that he was denied effective assistance of trial counsel. Contemporaneously with his direct appeal Crippen made a motion to vacate his judgment of conviction. His sole claim was that trial counsel was ineffective. Crippen filed an affidavit in support of his motion and he both attacked his attorney's competence and recounted his recollection of his conversations with defense counsel. We responded to defendant's motion and included an affidavit from defense counsel which explained the reasons for his actions. Any attorney-client privilege had, of course, been waived because Crippen made defense counsel's representation of him the subject of litigation and because Crippen revealed his recollection of the content of their conversations.

The trial court denied Crippen's motion and leave to appeal to the intermediate appellate court was granted. The direct appeal and the appeal from the denial of the motion to vacate were consolidated. The Appellate Division, Second Judicial Department, published its opinion on the combined appeals in August 1993. The court found that the trial record indicated that Crippen received meaningful representation through competent trial counsel. The court rejected the numerous claims presented and declined to second-guess trial counsel. The court

also found that the motion to vacate the judgment of conviction was properly denied. The court specifically rejected the idea that three cumulative witness should have been called at trial. Leave to appeal to the Court of Appeals of New York was likewise rejected. *People v. Crippen*, 196 A.D. 2d 548, 601 N.Y.S. 2d 152 (2nd Dept.), *lv. to app. denied,* 82 N.Y. 2d 848, 606 N.Y.S. 2d 600 (1993).

Crippen next sought collateral review in the federal courts. He petitioned for a writ of habeas corpus in the Eastern District of New York. His sole issue was the competency of trial counsel. Crippen again iterated his complaints, including that trial counsel should not have provided an affidavit in defense of his actions. Once again we responded to each unsubstantiated allegation and specifically noted that trial counsel's affidavit was the direct result of Crippen's affidavit. For whatever reason, Crippen waived his attorney-client privilege when he chose to both institute a legal proceeding based on trial counsel's representation and to reveal his recollection of the content of his conversations with trial counsel. Thus, in our Memorandum of law to the District Court, at page 54, we argued that there was no attorney-client privilege:

> Petitioner waived the attorney-client privilege when he moved to vacate his judgment of conviction based on alleged ineffective assistance of counsel. *People v. Dixon*, 204 A.D.2d 234, 235, 612 N.Y.S.2d 145 (1st Dept. 1994) (attorney-client privilege waived since defendant challenged counsel's representation). Parties waive the attorney-client privilege if they interject an issue into litigation which requires testimony from the attorney. *Thornton v. Syracuse Sav. Bank*, 961 F.2d 1042 (2nd Cir. 1992). Also, "[a] defendant may not use the privilege to prejudice his opponent's case or to disclose some selected

> communications for self-serving purposes." *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2nd Cir. 1991). Once a party discloses self-serving portions of his communications with his attorney the party cannot seek protection from other damaging portions of the communication. *Pleasantville Village Bd. v. Rattner*, 130 A.D.2d 654, 515 N.Y.S.2d 585 (2d. Dept. 1987).

The District Court, on February 20, 1997, denied Crippen's petition for a writ of habeas corpus and Crippen sought permission to appeal to the United States Court of Appeals for the Second Circuit. On or about May 16, 1997, Crippen submitted a document entitled *Application For Certificate of Appealability* and we responded to Crippen's application via a letter dated June 10, 1997. The Court of Appeals took no action with regard to this application. Rather, on December 10, 1997, the Court of Appeals notified counsel that the application would be treated as a motion for a certificate of probable cause. In response to the Court of Appeals notification Crippen submitted a document entitled *Petitioner Crippen's Supplemental Submission In Support of Application For Certificate of Probable Cause In Light of Supreme Court Decision In Lindh v. Murphy (Supplemental Submission)*. We responded, via affidavit, to Crippen's request for a certificate of probable cause and the Court of Appeals ultimately denied Crippen's request for a certificate of probable cause. Furthermore, Crippen petitioned for a rehearing from the order denying a certificate of probable cause and specifically noted that the rules regarding a certificate of appealability did not apply to this case.

REASONS FOR DENYING THE WRIT

Under the guise of seeking certiorari about a narrow and technical issue of habeas corpus jurisprudence Crippen attempts

to again re-litigate a baseless claim that trial counsel was ineffective. Even Crippen, however, does not suggest that the courts which have reviewed his ineffective assistance of counsel claim have applied the wrong legal standard; rather he wishes further factual review. A fact determinative review is rarely, if ever, the proper subject for this Court. With this in mind Crippen asserts that if his application for a certificate of appealability were reviewed under a different standard the Second Circuit Court of Appeals would have granted review and — in turn — reached a different conclusion than every other court which has examined trial counsel performance. Crippen's application was, however, reviewed based on the long-standing and well understood criteria for granting a certificate of probable cause.

Crippen's petition for a writ of habeas corpus was filed in the District Court's Clerk's Office on February 21, 1995 and an Order to Show Cause requiring a response was issued on February 14, 1995. The response was dated March 30, 1995. All of these acts pre-date the Antiterrorism and Effective Death Penalty act of 1996 (AEDPA), Pub. L. No. 140-132, 110 Stat. 1214, which amended the procedures governing habeas corpus applications by prisoners in state custody. The District Court's Memorandum and Order denying Crippen's petition for a writ of habeas corpus was issued on February 20, 1997 after the effective date of the AEDPA — April 24, 1996.

There was no question that the AEDPA did not apply to Crippen's petition for a writ of habeas corpus. There was, however, actually some question whether the new certificate of appealability would apply to Crippen's case because the request for and decision about whether Crippen could appeal from the District Court's decision post-dated the effective date of the AEDPA. In *Reyes v. Keane*, 90 F.3d 676 (2nd Cir. 1996) the Court of Appeals had held that the AEDPA did not apply to habeas corpus petitions filed before the effective date of the act,

but the requirements for a certificate of appealability rather that a certificate of probable cause did apply. The court reasoned that the new standards for leave to appeal should apply since the application was made after the effective date of AEDPA.

The reasoning of Reyes was called into question by *United States v. Perez*, 129 F.3d 255 (2nd Cir. 1997). In *Perez* the court held that, in a case brought pursuant to 28 U.S.C. § 2255, a certificate of appealability was not required if the case was filed before April 24, 1996. The court relied on the holding in *Lindh v. Murphy*, __ U.S. __, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997), to reach this determination. Thus, in *Lindh* the provisions of the AEDPA were held not to apply to cases filed before the effective date of the act. Any doubt about the appropriate mechanism to seek review of habeas corpus cases filed before April 24, 1996 was dispelled in *Tankleff v. Senkowski,* 135 F.3d 235 (2nd Cir. 1998). In *Tankleff* the court specifically held that cases brought under 28 U.S.C. § 2254 should not be treated any differently than cases brought under 28 U.S.C. § 2255. Thus, a certificate of probable cause rather than a certificate of appealability was the proper mechanism to seek further review of a petition for a writ of habeas corpus filed before April 24, 1996, even when the application for further review post-dates the effective date of the legislation.

Here, there is no doubt that Crippen's application to the United States Court of Appeals for the Second Circuit was determined as a certificate of probable cause. Although the application straddles the Circuit Court's decisions regarding which statute was applicable, the letter sent by the Circuit Court and their decision denying review leave no doubt that the Circuit Court denied an application for a certificate of probable cause. Crippen acknowledged this on December 16, 1997 when he filed his *Supplemental Submission* and cited *Nelson v. Walker*, 121 F.3d 828 (2nd Cir. 1997), for the proposition that the

Circuit Court should apply the mechanism for a certificate of probable cause. Furthermore, Crippen affirmatively stated that the provisions of AEDPA did not apply to his case and that he was seeking a certificate of probable cause. Crippen got what he asked for and his application was considered as a request for a certificate of probable cause.

The present petition for certiorari should be denied because Crippen has set up a non-existent conflict. He now claims that this Court should determine the proper standards of review when a certificate of appealability/probable cause is requested. Here, however, everyone — the Circuit Court and Crippen — agreed that a certificate of probable cause was the appropriate legal mechanism. There is no question about the standards for such a certificate. Crippen, however, was set up a straw man in order to obtain a factual review of his case.

There can be no serious allegation that the State and Federal Courts are unaware of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and the jurisprudence regarding effective assistance of counsel. There is no question that the State and Federal courts used the correct legal principles and applied the facts to them. Despite Crippen's presentation there is no dispute among all of the lower courts that Crippen received the effective assistance of trial counsel. Crippen, however, disagrees with the result of the lower courts analysis and — in essence — wants this Court to direct the Circuit Court to reevaluate the facts of this case and issue a certificate of probable cause. Further fact based review is, however, unwarranted, as is a direction to reevaluate the evidence and issue a certificate of probable cause. There is no legal dispute in this case, only a factual one, and a writ of certiorari should not be issued.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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